Supreme Court, U.S.

01 341 SEP 20 2001

No. _____

IN THE

Supreme Court of the United States

October Term, 2000

THOMAS E. TILLEY,

Petitioner,

vs.

TOWN OF ABERDEEN; J. ARTHUR PARKER; TONY ROBERTSON; GILES HOPKINS; DON WALKER; THE BROUGH LAW FIRM; WILLIAM C. MORGAN, Jr.; THE NORTH CAROLINA DEPARTMENT OF HEALTH SERVICES, DIVISION OF HEALTH SERVICES; COUNTY OF MOORE; STEVE BIGGS; BILL MARTS; SAMUEL W. FIELDS,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas E. Tilley
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Chapel Hill, NC 27514
Telephone: (919) 489-2263

QUESTIONS PRESENTED

I. Whether the takings, due process, equal protection, and conspiracy claims were prudentially ripe.

LIST OF PARTIES

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OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals denying Thomas Tilley's appeal is not reported. The *per curiam* opinion was filed May 23, 2001, and is styled *Tilley, et al. v. Town of Aberdeen, et al.*, Appeal No. 01-1192 (4th Circuit), and is reprinted in Appendix A.

The United States District Court's Memorandum Opinion denying Thomas Tilley's Rule 59(e) motion is not reported. The opinion was filed January 16, 20001, and is styled as *Tilley, et al. v. Town of Aberdeen, et al.*, Case No. 1:98:CV00896 (M.D.N.C., January 16, 2001), and is reprinted in Appendix B.

The Order and Memorandum Opinion of the United States District Court dismissing Thomas Tilley's action as not ripe is not reported. The Order and Memorandum Opinion were filed March 30, 2000, and are styled *Tilley, et al. v. Town of Aberdeen, et al.*, Case No. 1:98:CV00896 (M.D.N.C., March 30, 2000), and are reprinted in Appendix C.

JURISDICTION

The opinion of the Fourth Circuit Court of Appeals in this case, denying Thomas Tilley's appeal, was filed on May 23, 2001. This petition is therefore timely under Supreme Court Rules 13.1, 13.3, 29.2, & 30.1 if mailed U.S.P.S. first class, postmarked by August 21, 2001.

This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the following constitutional and statutory provisions:

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fifth Amendment

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Thomas Tilley filed a civil rights complaint, pursuant to 42 U.S.C. § 1983, with the United States District Court for the Middle District of North Carolina. The civil rights action was

seeking a declaratory judgment that Plaintiffs are entitled to park mobile homes and use the current septic systems in the Carolina Mobile Home Park, and to recover lost rents, punitive damages, and costs and fees arising from violations of procedural due process, substantive due process, equal protection, in the deprivation of, and conspiracy to deprive, Plaintiffs of the use of their property.

The various Defendants filed motions to dismiss and/or for summary judgment, pursuant to Rules 12(b)(1 and (b)(6), Fed. R. Civ. P., arguing that the case should be dismissed on ripeness grounds.

By Order of March 30, 2000, the District Court granted the Defendants motion to dismiss under Rule 12(b)(1) by ruling that these claims were prudentially unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny, because Plaintiffs failed to "seek a variance or to make use of North Carolina's inverse condemnation statute."

Thomas Tilley filed a Fed. R. Civ. P. 59(e) motion to alter, amend, or vacate the District Court's Order of March 30, 2000, which was denied by Memorandum Opinion filed January 16, 2001.

On appeal, Thomas Tilley argued (1) that the judgment should be vacated because the initial decision maker has made a final decision, and his claim is therefore ripe; (2) that neither the Supreme Court nor the Fourth Circuit requires exhaustion of state remedies as a prerequisite to bringing a takings action from a final decision; and (3) that the due process, equal protection, and conspiracy claims were ripe even if the takings claim was not.

The Fourth Circuit Panel issued its *per curiam* opinion on May 23, 2001, that "[w]e have "reviewed the record and the district court's opinions and find no reversible error."

This timely petition follows.

REASON FOR GRANTING THE WRIT

I. The Fourth Circuit Court Of Appeals Per Curiam Opinion That Thomas Tilley's Takings Claim Is Not Ripe For Adjudication Is In Conflict with United States Supreme Court Precedents.

The instant proceeding involves a question of exceptional importance because the Fourth Circuit Panel's/District Court's decision failed to distinguish the standard applied to a takings claim by this Court's decision in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001), which was rendered after the Fourth Circuit's *per curiam* opinion was filed.

The lower courts rulings that the claims were prudentially unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny, because Plaintiffs failed to "seek a variance or to make use of North Carolina's inverse condemnation statute," is the same error reversed by the *Palazzolo* Court.

The Rhode Island Supreme Court held that petitioner had not taken the necessary steps to ripen his takings claim, as the lower courts held in the instant matter, but the *Palazzolo* court held that: "The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision... ." *Palazzolo*, 121 S. Ct. at 2458.

Tilley is the trustee of Investment Trust, and owns a mobile home park originally located outside the town limits of Aberdeen, North Carolina. In 1986, the Town of Aberdeen annexed the park. When annexed, the park consisted of fifty-one sites. From 1989 through 1995, the Town, through its agents, refused to allow replacement mobile homes to be parked in twenty-five sites as they were vacated. The ground given for denying permits was that the mobile homes must hook up to the Town's sewer system.

The Town had no authority to require the mobile homes to hook up to the its sewer system.

The Town's ordinances state:

> The manufactured home park and all occupied units located in it must be connected to the municipal water and sewerage systems **or other systems** approved by the County Health Department or the State Department of Human Resources and Community Development, Division of Environmental Management.

Aberdeen Zoning Code § 155.156, passed 4-9-85.

> All developed properties in areas subsequently annexed to the town which are served by on-site septic systems **may continue to use those septic systems for a period not to exceed ten years from the date that sewer is made available** to those properties as long as those septic systems continue to be approved by the Moore County Health Department.

Aberdeen Public Works Ordinance § 50.32(D).

Because the town's public sewer system was not extended to the park until at least 1992,[1] Tilley had/has the right to use the functioning on-site septic systems until at least 2002. Tilley was never informed by the Defendants that he could appeal these decisions or how to do so.

In 1996, the Town, through its agent, adopted the position that the twenty-five lots made vacant by the above improper conduct would remain vacant, whether hooked up to the Town's sewer system or not, because the park fell within a commercial highway zone and was not a conforming use. The Town had no authority to prohibit Tilley from parking mobile homes in the park. It's ordinances state:

> Nonconforming uses. After March 10, 1975, pre-existing lots or structures, or the pre-existing uses of land or structures which would be prohibited under the regulations for the district in which it is located shall be considered as nonconforming. **It is the intent of this chapter to permit these nonconformities to continue until they are removed, but not to encourage their continued use**. Nonconforming structures or uses may be continued; provided, that they conform to the provisions of § 155.006.

Aberdeen Zoning Code § 155.005(C), passed 4-9-85.

> Extension of use. Nonconforming use of land or buildings shall not hereafter be enlarged or extended in any way.

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1. The exact date has yet to be determined because discovery was stayed pending dispositive motions.

Aberdeen Zoning Code § 155.006(B), passed 4-9-85.

> Cessation of use. **If active operations are discontinued for a continuous period of six months** with respect to a nonconforming use, such nonconforming use shall thereafter be used for a conforming use.

Aberdeen Zoning Code § 155.006(D), passed 4-9-85.

The Mobile Home Park has never discontinued operation; therefore, Tilley had/has the right to park mobile homes in the park. *In re Tadlock*, 134 S.E.2d 177, 178-80 (N.C. 1964); *In the Matter of Hensley*, 390 S.E.2d 727, 727-28 (N.C. App. 1990). Tilley was never informed that he could appeal these decisions or how to do so. All twenty-five (of fifty-one) sites remain vacant today.

The Complaint alleges that there was a conspiracy to deprive him of his constitutional rights to due process and equal protection, and that the Defendants took the park without compensation by making it impossible to operate the park profitably. The District Court dismissed these claims as not being prudentially ripe, and the Fourth Circuit affirmed in a *per curiam* opinion.

The lower courts dismissed all claims under 42 U.S.C. § 1983[2] that the Defendants deprived Tilley of property without due process of law, took the property without just compensation, violated equal protection rights by treating him

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2. All section references are to Title 42 unless otherwise specified.

differently than other property owners, and conspired to do so. The lower courts held that these claims were prudentially unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny, because Plaintiffs failed to "seek a variance or to make use of North Carolina's inverse condemnation statute."

(A) Finality Versus Exhaustion.

The Supreme Court has said that finality addresses "whether the **initial** decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson County*, 473 U.S. at 193. By contrast, "the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id.* Thus, if the purpose of the action not taken is "remedial," it is not a prerequisite to a § 1983 action. *Id.*

In *Williamson County*, the Commission denied Hamilton Bank's preliminary plat because it violated the zoning ordinance. *Williamson County*, 473 U.S. at 181. The Court held the § 1983 suit premature because Hamilton Bank did not seek a variance from the Commission, the initial decision maker. *Williamson County*, 473 U.S. at 194. The Court expressly said that if Hamilton Bank had been denied a variance, it would not have to appeal to the Board of Zoning Appeal or seek other remedies under state law before filing a § 1983 action:

> While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities,

> respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures are clearly remedial. Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not participate in the Commission's decision making.

Williamson County, 473 U.S. at 193 (citations omitted).

The Supreme Court reiterated the limitation of the finality rule to initial decision makers when it held "the type of 'final decision' required by our *Williamson County* precedents . . . address the virtual impossibility of determining what development will be permitted on a particular lot of land when its use is subject to the decision of [an initial decision making] regulatory body invested with great discretion, which it has not yet even been asked to exercise." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997).[3]

In the instant matter, the initial decision maker has made a final decision. For over a decade, the Defendants have refused to allow the replacement of mobile homes for those that move out of the park. As the Defendants denied each new request to park a mobile home, they reaffirmed their decision. This is not a case like *Williamson County* where some zoning board has re-zoned the subject property prohibiting some current or planned

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3. Also holding that a claim is not rendered unripe due to the fact that the "value" of the taking has not been determined. *Suitum*, 520 U.S. at 740-42.

use.[4] Any action before a zoning board in this case would be in the nature of an appeal because it was not the initial decision maker. The initial decision makers were the Defendants, and **their decisions** were final. Thus, Tilley does not need to seek remedial appeals of these final decisions before having ripe constitutional claims. The only question is whether those decisions were lawful.

As recently explained by this Court in *Palazzolo*:

> As we have explained, *Williamson County* and our other ripeness decisions do not impose further obligations on petitioner, for the limitations the wetland regulations imposed were clear from the Council's denial of his applications, and there is no indication that any use involving any substantial structures or improvements would have been allowed. Where the state agency charged with enforcing a challenged land use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-permit processes, see *Felder v. Casey, 487 U.S. 131, 150-151, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988),* federal ripeness rules do not require the submission of further and futile applications with other agencies.

Palazzolo, 121 S. Ct. at 2462.

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4. Tilley does not need a variance from any zoning or land use law because, as shown above, Tilley's use is allowed under the applicable ordinances and laws.

(B) State Remedies.

Despite dictum in *Williamson County*, neither the Supreme Court nor the Fourth Circuit require exhaustion of state remedies as a prerequisite to bringing a takings action from a final decision. In *Washlefske v. Winston*, 234 F.3d 179, 180 (4th Cir. 2000), the Court addressed the question of whether an inmate "was deprived of his private property without just compensation" when Virginia spent the interest earned from his prison accounts for the general benefit of inmates. After holding the decision was a final one, the Court held that:

> The only question to be determined therefore is the legality of the State's program. If we were, in this circumstance, to require Washlefske to file his claim first in a Virginia court, we would be transforming *Williamson County's* finality rule into a rule of exhaustion. This result would be in diametric opposition to a foundational decision of modern § 1983 jurisprudence, *Monroe v. Pape*, which held that "the federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. 167, 183, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).
>
> It is not surprising, therefore, that the Supreme Court, when faced with a similar claim that had reached an identical state of maturity as the claim before us, exercised jurisdiction over the claim without expressing any reservation that jurisdiction was proper. See *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172, 141 L. Ed. 2d 174, 118 S. Ct. 1925 (1998) (holding that clients had a protected property interest in the interest in their attorneys' trust accounts). As a

> Supreme Court plurality observed in *Eastern Enterprises*, "'while we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio, neither should we disregard the implications of an exercise of judicial authority assumed to be proper' in previous cases." 524 U.S. at 522 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 307, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)).
>
> We therefore conclude that Washlefske's Taking Clause claim is sufficiently mature, defined, and immediate to be ripe for consideration within our jurisdiction.

Washlefske, 234 F.3d at 183.

In this case, the only question is also the legality of the Defendants' conduct. The claims are, therefore, ripe and the lower court's contrary holding was legal error. Consequently, the denial of the motion to alter, amend, or vacate was an abuse of discretion.

II. Whether The Due Process, Equal Protection, And Conspiracy Claims Were Ripe Even If The Takings Claim Was Not.

On an issue of first impression in the Fourth Circuit, the lower courts held the claims ancillary to unripe takings claims were also unripe. The Supreme Court has also not addressed this issue. *Suitum*, 520 U.S. at 733 n.6.

The Sixth Circuit had adopted the view that the finality rule does not apply to these claims. In *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991),

the court held:

> [A] procedural due process claim is instantly cognizable in federal court without requiring a final decision . . . from the responsible municipal agency . . . . [I]n the case of a procedural due process claim, the allegedly infirm process is an injury in itself, whereas, in the context of a takings claim, the alleged injury – a diminution in property value – cannot be assessed with any degree of certainty until the municipality arrives at a final decision as to how the property owner will be permitted to develop his property.

In *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992), the court determined that an equal protection claim could be brought against a city ordinance even though the plaintiff had not exhausted its taking claims because of the holding in *Nasierowski*. In *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992), the court held that "the very existence of an allegedly unlawful zoning action, without more, makes a substantial due process claim ripe for federal adjudication."

In *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 159 (6th Cir. 1992), however, the court applied the finality rule to a procedural due process claim. In so doing, though, *Bigelow* made a determination of whether the denial of due process itself produced an injury. After distinguishing *Nasierowski* as a case that brought only a due process claim, the *Bigelow* court analyzed two Ninth Circuit cases which addressed bundled claims. *Bigelow*, 970 F.2d at 159. The first case stated:

> the final decision requirement is applicable to

> substantive due process and equal protection claims . . . and is most likely applicable to related procedural due process claims.

Id. The second case, after noting that bundled procedural due process claims may be subject to ripeness requirements, clarified that ripeness does not apply to a denial of procedural due process that results in the instantaneous infliction of a concrete injury. *Id.* Summing up, the Court held:

> *Nasierowski* appears to stand merely for the sensible proposition that while different circumstances may produce different results, the final decision rule does not apply when the denial of procedural due process itself creates an injury.

Bigelow, 970 F.2d at 160.

Later panels of the Sixth Circuit have not accepted the change in law that the *Bigelow* decision sought to establish. In *Harris v. City of Akron*, 20 F.3d 1396, 1402-03 (6th Cir. 1994), the court ignored the holding in *Bigelow* as to both procedural and substantive due process claims because the case was not presented as a "taking case," but as a "pure due process case" – the taking claims having been previously dismissed on finality grounds. *Id.* The rule in *Bigelow* was also ignored by another panel of the Sixth Circuit in *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201 n.2 (6th Cir. 1993). The *Triomphe* panel noted the rule in *Pearson*, which is the rule from *Nasierowski*, and followed the rule as precedent even though in its case the substantive due process claim "was no different from an ordinary takings claim."

In light of these authorities, the issue of whether these

claims are subject to the *Williamson County* finality requirements was settled in the Sixth Circuit by the decision in *Nasierowski*. As noted in the *Seguin* decision, this determination is binding within the Sixth Circuit until either the Supreme Court issues an inconsistent opinion or the Circuit Court sitting *en banc* elects to reconsider the matter. *Seguin*, 968 F.2d at 590; *Salmi v. Secretary of Health & Human Services*, 774 F.2d 685, 689 (6th Cir. 1985). Accordingly, in the Sixth Circuit, substantive and procedural due process and equal protection claims may be reviewed regardless of the *Williamson County* finality requirements.

It goes without saying that if claims of constitutional violations are ripe, a charged conspiracy to commit those violations is also ripe. *Sequin*, 968 F.2d at 590.

The Tenth Circuit has also held that a procedural due process claim may be litigated despite the fact a related takings claim was unripe. In *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 719 (10th Cir. 1988), the defendants' actions were alleged to constitute a denial of plaintiff's right to procedural and substantive due process, equal protection, and just compensation for a taking; an unspecified conspiracy; and pendent state claims. The district court held that none of the claims were ripe under the finality rule. Discussing the procedural due process claim, the court held:

> There are many intangible rights that merit the protection of procedural due process although their infringement falls short of an exercise of the power of eminent domain for which just compensation is required under the Fifth and Fourteenth Amendments.
>
> Here, Del City's failure to issue the specific permits

> Landmark requested does not give rise to a ripe takings claim because this failure does not dictate the permitted level of development with sufficient finality. If Landmark had a property interest in those specific permits, however, Del City could not withhold them without affording Landmark due process. Thus Landmark's procedural due process claim may not be dismissed as unripe.

Landmark, 874 F.2d at 723 (citations omitted).

The Fifth Circuit has recently analyzed the issue and held that constitutional claims that "assert rights not protected by the Takings Clause" are "not amenable to treatment as a takings claim." *The John Corp. v. Vanguard Ltd Inc.*, 214 F.3d 573, 585 (5th Cir. 2000). After dismissing a takings claim as unripe, the court analyzed the application of *Williamson County* to due process and equal protection claims and held that a substantial due process and equal protection claim was ripe for review. *John Corp*, 214 F.3d at 581-85. The court held that a pre-taking procedural due process claim, however, fell within the takings claim. *John Corp*, 214 F.3d at 585-86. The instant post-taking procedural due process claim would be ripe under *John Corp*, however, because it asserts a right not protected by the takings clause (to wit, not to be deprived of any property, even that not constituting a taking, without due process of law).

Therefore, the better rule is that procedural and substantive due process, and equal protection, claims may be asserted in a § 1983 action because each claim asserts rights not encompassed in the Takings Clause.

Procedural due process protects Tilley from being deprived of any property without notice reasonably calculated to inform

him of the availability of an opportunity to present his objections to the Defendants' conduct. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13-15 (1978). This constitutional right protects Tilley before property deprivation reaches a constitutional taking. Tilley's factual and legal basis for asserting a procedural due process claim is fully set forth in Opposition to the Aberdeen Defendants' Motion to Dismiss and Trial Brief.

Substantive due process protects Tilley from the arbitrary or capricious deprivation of any property right. *Brown-Ferris Industries v. Wake County*, 905 F. Supp. 312, 317 (E.D.N.C. 1995). The Supreme Court in recent years has at least thrice reaffirmed a general right of substantive due process, stating that "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Birch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986); see also *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 223-26 (1985). Tilley's factual and legal basis for asserting substantive due process claims is fully set forth in Opposition to the Aberdeen Defendants' Motion to Dismiss and the Trial Brief.

Equal protection protects Tilley from being treated differently by the Defendants than a similarly situated property owner without a reason rationally related to a legitimate governmental interest. *Brown-Ferris*, 905 F. Supp. at 322. Tilley's factual and legal basis for asserting equal protection claims is fully set forth in Opposition to the Aberdeen Defendants' Motion to Dismiss and the Trial Brief.

Each of these causes of action asserts rights to recovery of damages independent of the takings claim. Therefore, they are

ripe independently of the prudential ripeness analysis of *Williamson County*. Otherwise, the result will be diametrically opposed to a foundational rule of modern § 1983 jurisprudence, that "the federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the federal one is invoked." *Washlefske*, 234 F.2d at 183. Also, conspiracy to deprive Tilley of his fundamental and procedural rights are axiomatically ripe.

These claims are, therefore, ripe and the District Court's contrary holding, affirmed by the Fourth Circuit's *per curiam* opinion, was legal error.

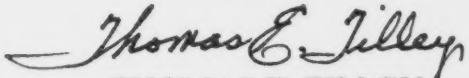
Because the District Court and the Fourth Circuit Court of Appeals failed to properly apply long and well settled law of this Court, the opinions are in conflict with the recent decision of *Palazzolo v. Rhode Island*, 121 S. Ct. 2448; 150 L. Ed. 2d 592 (2001), there is confusion in the circuit courts concerning whether causes of action asserting rights to recovery of damages independent of the takings claim, which is a first impression issue in the Supreme Court, a writ of *certiorari* should issue to correct the judgment and end the confusion.

CONCLUSION

For each and all of the above grounds, a writ of certiorari should issue.

The decisions below should be reversed.

Respectfully submitted,



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August 20, 2001.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THOMAS C. TILLEY; INVESTMENT TRUST,

Plaintiffs - Appellants,

v. No. 01-1192

TOWN OF ABERDEEN; J. ARTHUR PARKER, in his capacity as Mayor for the Town of Aberdeen, and individually; TONY ROBERTSON, in his capacity as Town Manager for the Town of Aberdeen, and individually; GILES HOPKINS, in his capacity as Planning Director for the Town of Aberdeen, and individually; DON WALKER, in his capacity as Code Enforcement Officer, and individually; THE NORTH CAROLINA DEPARTMENT OF HEALTH SERVICES, DIVISION OF HEALTH SERVICES; COUNTY OF MOORE; STEVE BIGGS, former Town Manager of Aberdeen; BILL MARTS, former Mayor of the Town of Aberdeen; and SAMUEL W. FIELDS, in his capacity as an agent of the N.C. Dept. of Human Resources, and individually.,

Defendants - Appellees.

and

THE BROUGH LAW FIRM, in its capacity as attorneys for the Town of Aberdeen; WILLIAM MORGAN, individually and in his capacity as attorney for the Town of Aberdeen,

Defendants.

Appeal from the United States District Court for the Middle

District of North Carolina, at Durham. N. Carlton Tilley, Jr., Chief District Judge. (CA-98-896-1)

Submitted: May 17, 2001 Decided: May 23, 2001

Before WIDENER, NIEMEYER, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Thomas E. Tilley, Appellant Pro Se; Knox Kent Lively, III, Greensboro, North Carolina, for Appellants. Timothy Patrick Sullivan, Robin Tatum Morris, Michelle Lee Frasier, POYNER & SPRUILL, Raleigh, North Carolina; Mabel Y. Bullock, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, Raleigh, North Carolina; Tyrus Vance Dahl, Jr., Andrew Christian Buckner, WOMBLE, CARLYLE, SANDRIDGE & RICE, Winston-Salem, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Thomas E. Tilley and Investment Trust appeal from the district court's orders dismissing their conspiracy, due process, equal protection, and taking claims as unripe and denying their motion for reconsideration. We have reviewed the record and the district court's opinions and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Tilley v. Town of Aberdeen, No. CA-98-896-1 (M.D.N.C. Jan. 16 & Mar. 30, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the

materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS E. TILLEY, et al.

Plaintiffs,

-vs- No. 1:98CV00896

TOWN OF ABERDEEN, et al.,

Defendants.

MEMORANDUM OPINION

TILLEY, Chief Judge

This case is now before the Court on Plaintiff's motion [Doc. #62], pursuant to Fed. R. Civ. P. 50(e), to alter, amend, or vacate the Court's Memorandum Opinion of March 30, 2000 [Doc. #59]. For the reasons provided below, this motion is DENIED.

A judgment may be amended by Rule 59(e) to accommodate an intervening change in law; to account for new evidence not available at trial; to correct a clear error of law; or prevent manifest injustice. See *Pacific Ins. Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Such motions are not designed to "relitigate old matters" or raise novel legal arguments that could have been raised prior to judgment. *Id.* at 404 (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* sec. 2810, at 127-28 (2d ed. 1996)); *Life Advocates, Inc. v. City of Asheville*, No. 1:00CV87, 2000 WL 1804734, at *1 (W.D.N.C. Nov. 3, 2000)

(noting Rule 59(e) is not available for a party "to finish presenting one's case*). Furthermore, reconsideration of a judgment is an "extraordinary remedy which should be used sparingly." *Pacific Ins.*, 148 F.3d at 404 (quoting Wright et al., *supra* sec. 2810.1, at 124).

Plaintiffs raise various arguments in their motion to reconsider. Plaintiffs have failed to show an intervening change in law, new evidence not available at trial, or a clear error of law justifying relief from judgment. Instead, Plaintiffs either re-litigate matters already considered by the Court or raise legal claims which could have been raised in the original summary judgment pleadings. This Court will not consider such legal issues or claims in violation of Rule 59(e), and no manifest injustice results from this decision.

Lastly, Plaintiffs request leave to amend their complaint presumably pursuant to Fed. R. Civ. P. 15(a). Rule 15(a) declares that leave to amend a complaint should be freely given when "justice so requires." The Supreme Court though has noted that such leave need not be freely give when concern exists for "undue delay, bad faith ... of the movant, repeated failure to cure deficiencies ..., undue prejudice to the opposing party, ... [or] futility of the amendment." *Foman v.* Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962). Furthermore, most courts have refused to allow amendment of a complaint, once a judgment has been entered, until that judgment has been set aside pursuant to Rule 59 or Fed. R. Civ. P. 60. See 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, sec. 1489, at 692-93 (2d ed. 1990) (citations omitted); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1111 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054, 105 S.Ct. 1758 (1985); *Pelzer v. Gamco*. No. 88-2075, 1988 WL 92896, at *2 (4th Cir. (Md.) September 1, 1998).

In this case, a judgment has been entered; the case was dismissed in its entirety by Memorandum Opinion of March 30, 2000. For reasons already presented, this court will not set aside that judgment pursuant to Rule 59(e). Thus, Plaintiffs will not be granted leave to amend their complaint. Furthermore, justice does not require that Plaintiffs be given such an opportunity at this point in the proceedings.

In conclusion, Plaintiffs' motion to reconsider the Court's Memorandum Opinion is DENIED.

This the 16th day of January, 2001.

N. CARLTON TILLEY
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS E. TILLEY, et al.,

Plaintiffs,

-vs- No. 1:98CV00896

TOWN OF ABERDEEN, et al.,

Defendants.

ORDER

This case is now before the Court on motions by various Defendants to dismiss [Doc. #14] and/or for summary judgment [Docs. #30, 49], and on the Plaintiffs' Motion for Extension of Time [Doc. #48]. For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Order, this case is DISMISSED. Therefore, the Motion for Extension of Time is DENIED as MOOT.

This the 30th day of March, 2000.

N. CARLTON TILLEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS E. TILLEY, et al.,

Plaintiffs,

-vs- No. 1:98CV00896

TOWN OF ABERDEEN, et al.,

Defendants.

MEMORANDUM OPINION

TILLEY, Chief Judge.

This case is now before the Court on motions by various Defendants to dismiss [Doc. #14] and/or for summary judgment [Docs. #30, 49]. For the reasons given below, this case is DISMISSED in its entirety.[1]

I.

The Plaintiffs in this matter are Mr. Thomas Tilley and an entity called "Investment Trust." Mr. Tilley is the trustee of Investment Trust, which owns a mobile home park originally located just outside the town limits of Aberdeen, North Carolina. The park has fifty-one sites. In 1986, the Town of Aberdeen annexed some land, including the park. A town

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1. The Plaintiffs' motion for Extension of Time [Doc. #48] is therefore DENIED as MOOT>

ordinance in place at that time apparently required all residences within town limits to be hooked up to the town's sewers, but allowed annexed properties ten years to come into compliance. The park operates on a septic tank system.

Each year between 1989 and 1995, several lots at the park were vacated. A representative of the town apparently told Mr. Tilley that the sites could not be filled until they were hooked up to the town's sewer system. All those lots – about twenty-five of them – remain vacant today. In 1996, a representative of the town allegedly told Mr. Tilley that the vacated spots could not be filled, whether hooked up to the sewer or not, because the park fell within a "commercial highway" zone but was not a conforming use for that zoning classification. The Plaintiffs concede that the park is not a conforming use under the town's current zoning scheme, but they contend that the zoning laws allow nonconforming uses to remain in place until such uses are ceased for six months or more. The park, the Plaintiffs argue, has never ceased operations, so the town cannot legally prevent the filling of the vacant sites.

In 1998, certain officials of the town found the park to be a nuisance. The town also threatened other legal action against the park. That same year, an Environmental Health Specialist with the North Carolina Department of Heath Services, Mr. Samuel Fields, issued a sewage violation notice because some raw sewage was being spilled on the ground in the park. When the sewage leak was fixed, Mr. Fields sent a compliance letter to Mr. Tilley.

The Plaintiffs then filed this suit. They allege that there was a conspiracy to deprive them of their constitutional rights to due process and equal protections, and that the town and its officials took the park without compensation by making it impossible to

operate the park profitably. They also claim that their reputations have been defamed as the park has become a run-down eyesore due to lack of funds with which to keep it in repair. The Complaint requests a jury trial and asks for $300,000 in lost rents, $1,000,000 in punitive damages, a declaratory judgment that the vacant lots can be filled and that the septic system can be used, and fees and costs. The various Defendants have filled motions to dismiss and/or for summary judgment.

II.

The standard for motions to dismiss under Rule 12(b)(6) is well known. "In general, a motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief. In considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993) (citations omitted).

The Town of Aberdeen has also moved to dismiss on ripeness grounds. Such an argument is appropriately made pursuant to Fed. R. Civ. P. 12(b)(1). See, e.g., *Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp.*, 90 F.3d 671, 675-76 (2d Cir. 1996). The town contends that the Complaint, on its face, reveals a lack of ripeness given certain ripeness standards for land-use claims. In evaluating such a facial ripeness challenge, the Court must view the Complaint in the light most favorable to the Plaintiffs, just as it does in the 12(b)(6) context. See, e.g., *Carter v. Arlington Pub. Sch. Svs.*, 82 F.Supp.2d 561, 564 (E.D. Va. 2000).

Because, for the reasons set forth below, there is no need to reach the summary judgment motions, it is not necessary to set forth the legal standard applicable to such motions.

III.

The first issue to be addressed is the Plaintiffs' defamation claim. This claim is alleged in paragraph XXXII of the Complaint, which reads in its entirety: "By reason of the conduct of defendants, and each of them, amounting to a taking of Plaintiffs' PROPERTY, Plaintiff [sic] has totally been unable to earn sufficient incomes to keep the park in good repair. This anticipated result of the Defendant's [sic] conspiracy has resulting [sic] in continuing defamation of Plaintiff's [sic] reputation."

It is hornbook law that an action for defamation cannot be maintained in the absence of a defamatory statement published by a third party. See, e.g., *McKeel v. Latham*, 162 S.E. 747, 747 (N.C. 1932); *see generally* 50 Am. Jr. 2d Libel and Slander sec. 235 (1995) ("[P]ublication of the allegedly defamatory matter is an essential element of a cause of action for defamation."). Since the Complaint does not allege any such published statement, the defamation claim is DISMISSED pursuant to Fed. R. Civ. P. 12(b)(6).[2]

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2. In any case, the Plaintiffs seem to have abandoned this claim. They did not respond to the Moore County Defendants' motion for summary judgment on the issue, nor does their trial brief mention the claim.

IV.

Next, the Plaintiffs' constitutional claims must be considered. These claims are made pursuant to 42 U.S.C. Section 1983. The Plaintiffs contend that the Defendants deprived them of property without due process of law, took their property without just compensation, and violated the Equal Protection Clause by treating them differently than other property owners.

The Defendants argue that the Plaintiffs' claims are not ripe for adjudication. They rely on *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny. *Williamson* involved a takings claim made by a developer whose proposed subdivision was first tentatively approved, then ultimately rejected as contrary to zoning regulations, by a local planning commission. The developer filed suit under section 1983, but the Supreme Court dismissed the case as not ripe, because the developer had neither applied for a variance nor sought to obtain compensation for the supposed taking through inverse condemnation proceedings. *See generally id.* at 186-97.

A prospective plaintiff must seek a variance before coming to court because there is no way to determine whether property has been "taken," in a constitutional sense, until a "final, definitive" decision has been made regarding permissible uses of the land in question. *Id.* at 191; see also *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-53 (1986). Until a variance has been sought, no "final" decision has been made. Similarly, a prospective plaintiff must make use of inverse condemnation proceedings before bringing suit under section 1983 because there is no way to determine if "just compensation" has been provided until just compensation has

been sought. *See id.* at 194-197.

The Plaintiffs have failed to seek a variance or to make use of North Carolina's inverse condemnation statute. See N.C. Gen. Stat. sec. 40A-51. Thus, it appears that their constitutional claims are not ripe.

The Plaintiffs attempt to avoid this conclusion by arguing that they are challenging not only a zoning decision, but also various other actions taken by the Defendants. Even if true, this response misses the point. The *Williamson* doctrine is not limited to municipal zoning cases; rather, it applies in all land-use contexts. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1010-14 (1992) (applying *Williamson* in context of statewide ban on coastal development); *Gilbert v. City of Cambridge*, 932 F.2d 51, 63 (1st Cir. 1991) (applying *Williamson* in context of municipal permitting requirement for condominium conversions). Because the Plaintiffs seek to challenge a local land-use decision, *Williamson* applies.

The Plaintiffs also contend that seeking a variance would have been futile and that the requirement that they seek one is therefore excused. They rely on *Lucas* for support, but that was a far different case than the one at bar. In *Lucas*, the Supreme Court declined to dismiss a case on ripeness grounds where (1) the governmental body from which the plaintiff might have requested a variance stipulated that it would not have granted one; (2) the governmental body was apparently not empowered to grant variances, because the land-use regulation at issue was an absolute, statewide ban on coastal construction; and (3) the state supreme court had expressly rejected a ripeness argument. See *Lucas*, 505 U.S. at 1006-12 n. 3. None of these circumstances is present in the instant case. Moreover, even if these circumstances excused the requirement that the Plaintiffs

seek a variance, this case would still not be ripe because the Plaintiffs have not sought compensation by inverse condemnation.

The Plaintiffs might argue that even if their takings, equal protection, and substantive due process claims are not ripe, their procedural due process claim is ripe.[3] The Sixth Circuit, among others, has adopted the view that the *Williamson* requirements do not apply to some procedural due process claims. As that court explained:

> [A] procedural due process claim is instantly cognizable in federal court without requiring a final decision ... from the responsible municipal agency.... [I]n the case of a procedural due process claim, the allegedly infirm process is an injury in itself, whereas, in the context of a taking claim, the alleged injury – a diminution in property value – cannot be assessed with any degree of certainty until the municipality arrives at a final decision as to how the property owner will be permitted to develop his property.

Nasierowski Bros. Inv. co. v. City of Sterling Heights, 949 F.2d 890, 894 (6th Cir. 1991). However, even the Sixth Circuit applies the *Williamson* requirements when the procedural due process claim is bundled together with, and is ancillary to, other constitutional claims. See *Bigelow v. Michigan Dep't of*

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3. The Court assumes, for present purposes, that the Plaintiffs have alleged a procedural due process claim. It is far from clear that they have done so, however. The Complaint does not explicitly discuss procedural due process, and few, if any, of the factual allegations of the Complaint relate to procedural matters.

Natural Resources, 970 F.2d 154, 159-60 (6th Cir. 1992). The cases appear to be uniform that, in such circumstances, procedural due process claims are subject to the *Williamson* requirements. See, e.g., *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177, 179 (7th Cir. 1996) (quoting *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994); *Taylor Inv., Ltd. v. VGM Corp.*, 983 F.2d 1285, 1291-95 (3d Cir. 1993). Because the Plaintiffs' procedural due process claim is ancillary to their takings, substantive due process, and equal protection claims, it, too, is subject to the *Williamson* requirements.

Because the Plaintiffs have not satisfied the requirements of Williamson, their constitutional claims are DISMISSED for lack of ripeness.

VI.

The Plaintiffs allege that the Defendants have engaged in a civil conspiracy. The Complaint cites 42 U.S.C. Sections 1983, 1985 and refers to a "conspiracy ... to deny and deprive Plaintiff of rights guaranteed to it under the Constitution." (Compl. XXXI.) Therefore, it appears that the Plaintiffs are alleging a civil rights conspiracy, rather than a state-law civil conspiracy.[4] Civil rights conspiracies may be brought under either section

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4. An allegation of a state-law civil conspiracy would likely fail. Such an allegation cannot be maintained absent an underlying state law tort, see, e.g., *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1012 (D.S.C. 1981) (noting that North Carolina does not recognize civil conspiracy as a separate tort), and the Plaintiffs' only state law tort claim – for defamation – has been dismissed.

1983 or section 1985. Each possibility will be examined in turn.

The Plaintiffs cannot maintain an action under section 1983. Such an action, like any other land-use action brought under section 1983, is subject to the *Williamson* ripeness requirements. See *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088089 (11th Cir. 1996) (applying *Williamson* and finding section 1983 conspiracy claim unripe). Because the Plaintiffs have not met these requirements, they cannot maintain a section 1983 conspiracy claim. If it were otherwise, plaintiffs challenging land-use regulations could circumvent *Williamson* in almost every case simply by tacking on a conspiracy claim.

Similarly, the Plaintiffs cannot maintain an action under section 1985, even assuming that *Williamson* would not bar such a claim. That section is not a general tort statute, nor does it prohibit all conspiracies to deprive citizens of constitutional rights. Rather, it applies only to conspiracies, motivated by racism or other class-based animus, to deprive members of protected groups of constitutional rights in violation of equal protection guarantees. See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971); *Jackson v. Cox*, 540 F.2d 209, 210 (5th Cir. 1976). The Plaintiffs make no allegation that they are members of any protected group or that the Defendants conspired against them because of their protected status.[5] As a

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5. The Plaintiffs contend – not in the Complaint, but in later pleadings – that many residents of the park are members of minority groups. They suggest that the Defendants may be conspiring to reduce the stock of housing available to such persons by driving the park out of business. Because this

(continued...)

result, any claim under section 1985 must be dismissed.

VI.

Because no claims remain, this case is DISMISSED in its entirety.

This the 30th day of March, 2000.

N. CARLTON TILLEY
United States District Judge

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5. (...continued)
argument was not raised in the Complaint, it may not properly be before this Court. Regardless, the Plaintiffs do not appear to have standing to pursue it. See, e.g., *Puglisi v. Underhill Park Taxpayer Assoc.*, 947 F. Supp. 673, 692 (S.D.N.Y. 1996), *aff'd*, 125 F.3d 834 (2d Cir. 1997).

Supreme Court, U.S.
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No. 01-0321

In The

Supreme Court of the United States

THOMAS E. TILLEY,

Petitioner,

vs.

TOWN OF ABERDEEN; J. ARTHUR PARKER; TONY ROBERTSON; GILES HOPKINS; DON WALKER; THE BROUGH LAW FIRM; WILLIAM C. MORGAN, JR.; THE NORTH CAROLINA DEPARTMENT OF HEALTH SERVICES, DIVISION OF HEALTH SERVICES; COUNTY OF MOORE; STEVE BIGGS; BILL MARTS; SAMUEL W. FIELDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Contrary to Petitioner's assertions, the Fourth Circuit Court of Appeal's unpublished *per curiam* decision is correct and does not conflict with any holding of this Court or any federal circuit court. In an effort to convince this Court to review the lower court's opinion, the Petitioner argues that the decision below conflicts with *Palazzolo v. Rhode Island*, ___ U.S. ___, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). However, *Palazzolo* is not on point and, therefore, does not dictate the outcome in the case at hand. Thus, the Fourth Circuit was correct in finding that the Petitioner did not meet this Court's prudential ripeness test set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY PRIOR DECISION OF THIS COURT

The United States Court of Appeals for the Fourth Circuit was correct in finding that the Petitioner's case was not ripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). In *Williamson*, this Court developed a two-part test which requires that a "taking" claim will not be considered ripe for judicial review unless the claimants (1) have requested from the applicable agency a final decision regarding the application of the challenged regulations to the property, and (2) have similarly sought monetary compensation through the procedures provided by the state. *Williamson*, 473 U.S. at 186, 105 S. Ct. at 3115. State regulatory agencies must have the "opportunity to grant any variances or waivers allowed by law," and "until these ordinary processes have been followed, the

extent of the restriction on property is not known and a regulatory taking has not yet been established." *Palazzolo*, 121 S. Ct. at 2459 (citing *Williamson*, 473 U.S. at 186, 105 S. Ct. at 3115).

Williamson involved a takings claim made by a developer whose proposed subdivision was first tentatively approved, then ultimately rejected as contrary to zoning regulations, by a local planning commission. The developer filed suit under 42 U.S.C. Section 1983, but the Supreme Court dismissed the case as not ripe, because the developer had neither applied for a variance nor sought to obtain compensation for the supposed taking through inverse condemnation proceedings. *See Williamson*, 473 U.S. at 186-97, 105 S. Ct. at 3116-22. Similarly, in the case at hand, because the Petitioner seeks to challenge a local land-use decision, *Williamson* applies. Like in *Williamson*, the Petitioner failed to seek a variance or to make use of North Carolina's inverse condemnation statute. Accordingly, since the Petitioner did not meet this Court's two-part test, the Fourth Circuit Court of Appeals was correct in finding that Petitioner's case was not ripe for judicial review.

Petitioner incorrectly relied upon *Palazzolo*, which was "quite unlike [*Williamson* and its progeny]." *Palazzolo*, 121 S. Ct. at 2459. In *Palazzolo*, the petitioner was the owner of a waterfront parcel, most of which was salt marsh subject to tidal flooding. In 1971, Rhode Island created an agency (Council) to protect coastal wetlands that included this wetland parcel. *See Palazzolo*, 121 S. Ct. at 2455. In 1983, Palazzolo asked permission to construct a wooden bulkhead and to fill in the entire marshland area. Council denied this request. *See id.* In 1985, Palazzolo asked permission to fill in eleven of eighteen wetland acres to build a private beach club. Council again

denied this request on the basis that no compelling public purpose would be served. *See id.* Palazzolo filed an inverse condemnation action, arguing that the wetlands regulation had taken his property without compensation. *See id.* In *Palazzolo*, the Council "left no doubt" that the wetlands "could not be filled for any ordinary land use." 121 S. Ct. at 2459.

Unlike in *Palazzolo*, the Petitioner did not obtain a final decision from the appropriate state agency. As the Fourth Circuit Court of Appeals correctly pointed out, the Petitioner failed to seek a variance or to make use of North Carolina's inverse condemnation statute. Thus, Petitioner's constitutional claims were not ripe and this Court should dismiss Petitioner's petition for a writ of *certiorari*.

II. THE DECISION BELOW IS COMPLETELY IN ACCORD WITH OTHER CIRCUIT COURT DECISIONS

As demonstrated by the previous section, the decision below in no way conflicts with any decision of this Court. The decision below also does not conflict with any decision of the circuit courts. In actuality, the decision below is clearly in accord with the decisions of numerous circuit courts. *See, e.g., Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 159 (6th Cir. 1992); *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177, 179 (7th Cir. 1996) (quoting *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994); *Taylor Inv., Ltd. v. VGM Corp.*, 983 F.2d 1285, 1291-95 (3d Cir. 1993); *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1988). In an attempt to persuade this Court to grant *certiorari*, the Petitioner incorrectly stated that the Sixth Circuit is not in accord

with the other circuits. In order to construct the argument, Petitioner relied on *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), stating that the ripeness test of *Williamson* does not apply to bundled claims. However, in *Nasierowski*, the plaintiff did not present a takings claim, and relied solely on his claim for procedural due process. *See Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 159 (6th Cir. 1992) (citing *Nasierowski*, 949 F.2d at 894). Thus, in *Bigelow*, the Sixth Circuit Court of Appeals explained that the *Williamson* test applies if the case "does not present a pure claim of procedural due process, but instead involves several constitutional claims." 970 F.2d at 159. Hence, the Fourth Circuit Court of Appeals was in accord with the Sixth Circuit since Petitioner's claim involves several constitutional claims.

Furthermore, the Petitioner claimed that the Fourth Circuit is not in agreement with the Tenth Circuit. The Petitioner relied on *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717 (10th Cir. 1988), which held that a procedural due process claim may be litigated even though the takings claim was not ripe. However, the Tenth Circuit in *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1177 (10th Cir. 1999) overruled *Landmark*. In *Rau*, the court of appeals recognized that "the Tenth Circuit [had] previously determined that due process and equal protection claims are subsumed within 'the more particularized protection of the [Takings] Clause.'" 76 F. Supp. 2d at 1177 (citing *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) (quoting *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991)). Thus, the Tenth Circuit Court of Appeals in *Rau* held that an "unripe takings claim renders the ancillary due process and equal protection claims unripe as well. 'A contrary

holding would render the Supreme Court's decision in *Williamson* nugatory, as it would enable a resourceful litigant to circumvent the ripeness requirements simply by alleging a more generalized due process or equal protection violation.' " 76 F. Supp. 2d at 1177 (quoting *Bateman*, 89 F.3d at 709). Hence, contrary to the Petitioner's assertions, the Fourth Circuit is, in actuality, in complete accord with the other circuits. Therefore, this Court should deny Petitioner's petition for a writ of *certiorari*.

III. THE FOURTH CIRCUIT'S *PER CURIAM* OPINION IS NOT BINDING PRECEDENT IN THE FOURTH CIRCUIT

Unpublished opinions are not binding in the Fourth Circuit. *See Mueller v. Angelone*, 181 F. 3d 557, 579 (4th Cir. 1999); *see also* Local Rule 36(c). In the case at hand, the Fourth Circuit Court of Appeal's decision is an unpublished *per curiam* opinion. Therefore, since there is no wide-spread precedential value, this Court should not grant *certiorari* in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 01-321

In The
Supreme Court of the United States

THOMAS E. TILLEY,

Petitioner,

v.

TOWN OF ABERDEEN,
NORTH CAROLINA, *et al.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS TOWN OF ABERDEEN, J. ARTHUR PARKER, TONY ROBERTSON, GILES HOPKINS, DON WALKER, STEVE BIGGS and BILL MARTS

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PARTIES TO THE PROCEEDING

Defendants, the Brough Law Firm and William C. Morgan, Jr., were dismissed from this lawsuit pursuant to a stipulation of dismissal, signed by all parties, which was filed on July 12, 1999.

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STATEMENT OF THE CASE

This Brief in Opposition to the Petition for a Writ of Certiorari is submitted on behalf of defendants, Town of Aberdeen, J. Arthur Parker, Tony Robertson, Giles Hopkins, Don Walker, Steve Biggs and Bill Marts (collectively the "Aberdeen Defendants").

The following are additional facts or clarifications of statements in the Petition for a Writ of Certiorari. The complaint filed by Petitioner Tilley and Investment Trust[1] alleges only that the Town of Aberdeen, "through its agent", refused at various times to grant permission to bring additional mobile homes into the Carolina Mobile Home Park. The complaint does not contain any allegation that plaintiffs ever received any type of formal, final decision from the Town of Aberdeen, or that plaintiffs sought a variance from the Town. See Complaint, Appendix A.

Chapter 155 of the Aberdeen Code of Ordinances (hereinafter the "Zoning Code"), specifically states at § 155.253:

> It is the intention of this chapter that all questions arising in connection with the enforcement of this chapter shall be presented first to the administrative officer and that such questions shall be presented to the Board of Zoning Adjustment only on appeal from the administrative officer, and that from the decision of the Board of Adjustment, recourse shall be had to courts as provided by law.

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1 Until the filing of the Petition with this Court, Investment Trust, represented by counsel, had been a named plaintiff and had joined with Petitioner Tilley in all pleadings and briefs filed by the plaintiffs in this case. Additionally, consistent with Petitioner's representation to the court at oral argument, the district court indicated in its opinion dismissing Plaintiffs' claims that Investment Trust owned the mobile home park in question. See Appendix C, p.C-2 of Petition.

The Zoning Code further states: "[a]ppeals from the decision of the administrative officer shall be made to the Board of Adjustment." (Id. at §155.250).

Moreover, N.C. Gen. Stat. § 160A-388 states that, "[t]he Board of Adjustment shall hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of [a zoning ordinance]."

Petitioner's complaints arise from the interpretation and implementation of the Zoning Code. Petitioner alleged that at various times from 1989 to 1995 he had been refused permission to park mobile homes at a total of 25 lots in the mobile home park unless the trailers hooked up to the Town sewer system. He also claimed that in 1996 he was informed he could not use the 25 vacant lots to park trailers because it would violate the current zoning. However, Petitioner did not challenge the alleged decisions by the appropriate procedures, or otherwise seek relief, at that time nor has he ever. Accordingly, Petitioner has, at most, a decision from an administrative official that he cannot continue the use.

Petitioner also claimed he must be allowed to continue to use on-site septic systems. However, this is also an issue governed by the Zoning Code. Section 155.156 requires that "manufactured home parks be connected to municipal water and sewer systems or other systems approved by the County Health Department or the State Department of Natural Resources and Community Development . . . ." This provision is authorized by N.C. Gen. Stat. § 160A-317(a). Again, assuming Petitioner obtained an interpretation which would not allow the on-site septic system, he failed to pursue his remedies under the Zoning Code, but filed a direct action in federal court. Again, there was no final local decision.

Contrary to the assertion on page 3 of Petitioner's Statement of the Case, the complaint did not include an allegation of a violation of procedural due process. Only in response to the Aberdeen Defendants' Brief in Support of

their Motion to Dismiss did Petitioner seek to assert there had been a procedural due process violation. The alleged lack of notice regarding appeal rights (see Petition, p. 6-7), which is the basis for Petitioner's alleged procedural due process claim, was first raised by the Petitioner in a Declaration dated May 25, 1999, attached hereto as Appendix B, which was attached to Petitioner's and Investment Trust's brief in opposition to the Aberdeen Defendants' motion to dismiss. See ¶¶ 9, 10, 12 and 13 of Declaration, Appendix B.

ARGUMENT

As demonstrated below, there is no compelling reason for this Court to grant a writ of certiorari in this case. Both the district court decision and the Fourth Circuit Court of Appeals decision at issue are unpublished. Moreover, the district court decision affirmed by the court of appeals neither conflicts with a decision by this Court, nor with a decision of another United States court of appeals. The cases Petitioner relies on to assert otherwise are readily distinguishable based on different facts.

I. There is no Compelling Reason to Grant the Petition Because the Unpublished Decision at Issue is Not Binding Precedent in the Fourth Circuit.

The decision Petitioner is requesting this Court to review is a four sentence, unpublished per curiam opinion of the Fourth Circuit Court of Appeals (the "Opinion") which affirms an unpublished district court decision. See Appendix A and C of Petition.

Petitioner's assertion that this Court should review the Opinion because it conflicts with the recent decision of Palazzolo v. Rhode Island, __ U.S. __, 121 S. Ct. 2448 (2001) is without merit simply based on the fact that the Opinion is unpublished. An unpublished Fourth Circuit opinion is not binding precedent in the Fourth Circuit. See Hogan v.

Carter, 85 F.3d 1113, 1118 (4th Cir. 1996), cert. denied, 519 U.S. 974, 117 S. Ct. 408 (1996). In fact, the Opinion, which is designated as an "unpublished per curiam opinion", expressly states that "[u]npublished opinions are not binding precedent in this circuit." Thus, from a precedent standpoint, there is no opinion to conflict with Palazzolo. Accordingly, there is no compelling reason for this Court to grant the Petition because the Opinion is of significance only to the parties involved.

Next, to the extent the Petitioner also contends that his petition should be granted because the Opinion conflicts with a decision of another United States court of appeals, this argument too fails at the outset (without consideration of whether a conflict exists) for the same reason noted above. Because the Opinion does not constitute binding precedent in the Fourth Circuit, any alleged conflict with another circuit would not be sufficient to provide a compelling reason for this Court to exercise its discretion to review the Opinion.

II. The Palazzolo Decision Does Not Demonstrate that the Opinion at Issue is Erroneous.

Assuming *arguendo* that the Opinion has value as precedent, the Petitioner's assertion that the Opinion is in conflict with this Court's subsequent decision in Palazzolo v. Rhode Island, supra, is erroneous. The fact that Palazzolo held that a particular decision by the Rhode Island Coastal Resources Management Council ("Council") was final, and that a takings claim based on the Council's final decision could be asserted, in no way demonstrates that Palazzolo is in conflict with an opinion affirming a decision that the Petitioner's claims are not ripe. In both cases, the courts embraced and applied the principles set forth in Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108 (1985) for

determining whether a challenge to the application of land-use regulations is ripe. The outcomes were different because key underlying facts were very different.

The issue in Palazzolo was whether the Petitioner had obtained a final decision from the Council with regard to the extent of permissible development on the property in question, most of which is tidal salt marsh. The facts in Palazzolo clearly demonstrated that the decisions by the Council regarding the extent of permissible development in the wetland areas, including a decision affirmed on appeal that the one exception which would permit wetlands development under the Council's rules did not apply in this circumstance, left "no genuine ambiguity in the record as to the extent of permitted development on petitioner's property, either on the wetlands or the uplands." Id. at ___, 121 S. Ct. at 2460-61. There was "no doubt" that none of the wetlands on the property could be filled (i.e. no development was permissible in wetland areas), and the record also established that the upland portion of the property would have an estimated value of $200,000 if developed. Id. at ___, 121 S. Ct. at 2459-60. Thus, the Petitioner's takings claim in Palazzolo had ripened because the extent of permissible development on Petitioner's property was very clear.

In contrast, and similar to the facts in Williamson, the full extent of the use the Petitioner Tilley could make of the land had yet to be determined. As noted above, at best, the Petitioner had obtained an initial decision from an administrative official and had not pursued the available steps set forth in the Zoning Code for obtaining a final decision. Notably, the Palazzolo decsion points out that Williamson County and other cases addressing the application of land use regulations:

> [S]tand for the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, *including the opportunity to grant any variances or waivers allowed by law.*

Palazzolo at ___, 121 S. Ct. at 2459 (emphasis added). Because the Petitioner failed to pursue a variance or otherwise follow available avenues to allow the Town of Aberdeen to exercise its full discretion in this matter, his takings claim was not ripe. See Williamson, 473 U.S. at 191, 105 S. Ct. at 3118-19.

A second reason there is no jurisdiction in federal Court for this matter is that the Petitioner failed to exhaust his available state remedies as to the takings claim. The Court in Williamson, supra, also held the that the plaintiff's taking claim was not yet ripe because plaintiff had not sought compensation through the procedures Tennessee provided for doing so. The Court explained, "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yields just compensation,' then the property owner 'has no claim against the Government' for a taking." Id. at 194, 105 S. Ct. at 3121. Because the plaintiff had not shown that the Tennessee inverse condemnation procedure was

unavailable or inadequate to remedy any injuries suffered by plaintiff, plaintiff's taking claim was not ripe. Id. at 196-197, 105 S. Ct. at 3122.

There is likewise an inverse condemnation statute in North Carolina, which Petitioner failed to pursue. See N.C. Gen. Stat. § 40A-51; Williamson, supra. Until Petitioner has pursued these remedies, his zoning claims are not ripe for review and were properly dismissed for lack of jurisdiction.

There is no conflict between the case at bar and Palazzolo. Both cases properly apply the law set forth in Williamson to different sets of facts. Accordingly, the Palazzolo decision does not provide this Court with a compelling reason to grant the Petition.

III. Petitioner's Due Process, Equal Protection, and Conspiracy Claims Also Are Not Ripe.

Petitioner erroneously asserts that the Fourth Circuit's decision to affirm the dismissal of Petitioner's claims ancillary to his takings claim is in conflict with other circuits. As demonstrated below, cases involving taking claims arising out of land-use regulation decisions in which such claims are held to be unripe, also consistently hold that other ancillary claims are not ripe.

For example, the Williamson Court also addressed the ripeness of the plaintiff's due process claim, which was based on an argument that the regulation of property was an invalid exercise of the state's police power, rather than a taking. The Court held that the effect of the commission's action could not be determined until a final decision was made as to how the regulations would be applied to plaintiff's property. Because that decision had not yet been reached, plaintiff's due process claim was not ripe as well. Id. at 199-200, 105 S. Ct. at 3123.

Courts have also held that the "finality" requirement applied in Williamson to takings and due process claims also applies with the same force to equal protection claims. See e.g., Taylor Investment, Ltd. v. Upper Darby Township,

983 F.2d 1285 (3d Cir. 1993), cert. denied, 510 U.S. 914, 114 S. Ct. 304, 126 L. Ed. 2d 252 (1993); Bigelow v. Michigan Dept. of Natural Resources, 970 F.2d 154 (6th Cir. 1992); Southern Pacific Transportation Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 382, 116 L. Ed. 2d 333 (1991). See also Bateman v. City of West Bountiful, 89 F.3d 704, 709 (10th Cir. 1996) (holding that "final decision" requirement applies to due process and equal protection claims "that rest upon the same facts as a concomitant takings claim").

Petitioner's reliance on John Corp. v. City of Houston, 214 F.3d 573 (5th Cir. 2000) to argue that certain of his claims are ripe is misplaced. John Corp. is readily distinguishable from Williamson, and the case at bar, because a final decision had been reached in John Corp. The takings claim in John Corp. did not arise from an interpretation of a zoning or other land-use ordinance or regulation where a final decision regarding the extent of permissible use had not yet been reached; it stemmed from a city's actual demolition of the Appellants' building. The John Corp. court even acknowledged that Williamson's finality requirement applied to due process and equal protection claims where the ancillary takings claim was not final, such as in the case at bar. See Id. at 584-85.

The Petitioner also attempts to demonstrate that the Sixth Circuit has subsequently "ignored" Bigelow v. Michigan Dept. of Nat. Res., supra, in an effort to argue that certain claims, including an alleged procedural due process claim[2], are ripe. However, the cases Petitioner cites are all distinguishable from Bigelow, and they are not inconsistent with the holding in the case at bar that none of Petitioner's claims are ripe. Petitioner relies on Harris v. City of Akron, 20 F.3d 1396, 1402 (6th Cir. 1994), cert. denied, 513 U.S. 1001, 115 S. Ct. 512 (1994), but the court expressly distinguishes Bigelow as a takings case "in which the procedural due

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[2] As will be explained below, Petitioner did not allege a procedural due process claim.

process claim was 'ancillary to [the] main issue'." Petitioner also cites Triomphe Investors v. City of Northwood, 49 F.3d 198, 201, n.2 (6th Cir. 1995), cert. denied, 516 U.S. 816, 116 S. Ct. 70 (1995), but the only claim analyzed therein was a substantive due process claim.[3]

Similarly, Landmark Land Co. of Oklahoma, Inc. v. Buchanan, 874 F.2d 717, 719 (10th Cir. 1988), cited by Petitioner for the proposition that procedural due process claims may be litigated despite a related taking claim being unripe, is also distinguishable from the case at bar. In Landmark, the property interest in which the plaintiff asserted a right to procedural due process was not coextensive with the asserted taking claim. See Rocky Mountain Materials & Asphalt, Inc. v. Board of County Comm. of El Paso County, 972 F.2d 309, 311 (10th Cir. 1992) (distinguishing Landmark).[4]

Finally, the Petitioner's section 1983 conspiracy claim is also subject to the Williamson ripeness requirements. See New Port Largo, Inc. v. Monroe County, 95 F.3d 1084, 1088-89 (11th Cir. 1996), cert. denied, 521 U.S. 1121, 117 S. Ct. 2514 (1997). As the district court noted in its opinion in the case at bar, if Petitioner's section 1983 conspiracy claim were not also subject to the same ripeness requirements, "plaintiffs challenging land-use regulations could circumvent Williamson in almost every case simply by tacking on a conspiracy claim." Appendix C, p. C-10 of Petition.

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3 A takings claim had been dismissed by the lower court not because of lack of a final decision, but because of a failure to utilize the procedure available under state law to seek compensating for a taking. See Triomphe Investors v. City of Northwood, 835 F. Supp. 1036, 1047 (N.D. Ohio 1993).

4 Other cases cited by Petitioner, Bannum, Inc. v. City of Louisville, 958 F.2d 1354 (6th Cir. 1992) and Pearson v. City of Grand Blanc, 961 F.2d 1211, 1215 (6th Cir. 1992), did not even involve takings claims.

Accordingly, the Opinion is not in conflict with other circuits. The district court did not commit reversible error in dismissing all of the Petitioner's claims, and the decision was properly affirmed by the Fourth Circuit.

IV. The Complaint Does Not Allege a Procedural Due Process Claim.

As explained above in Section III., the district court did not err in holding that any procedural due process claim asserted by Petitioner also should be dismissed on ripeness grounds.

However, as a threshold matter, the record demonstrates that the Petitioner failed to assert a procedural due process claim in the complaint. The district court's decision stated in part that it "*assumes for present purposes,* that the Plaintiffs have alleged a procedural due process claim. It is far from clear that they have done so, however" (emphasis added). District court opinion, Petition, Appendix C, p. C-8, n.3.

There are no facts alleged whatsoever in the complaint that relate to a procedural due process violation. The complaint raises what only can be properly described as alleged *substantive* due process violations. For example, the Plaintiffs assert harm based on Aberdeen's "refus[al] to grant permits to park mobile homes." Appendix A, Complaint, ¶¶ XX - XXVI. Plaintiffs also allege harm based on a subsequent alleged notification by Defendant Biggs that "the twenty-five vacant lots would not be able to park trailers...." Id. at ¶ XXVII. It is these "acts and things above complained of" which Plaintiffs' allege constituted a violation of their Constitutional rights. Id. at ¶ XXXI. In summarizing such alleged violations the Plaintiffs state that the Defendants "determined to deprive Plaintiff of these rights in its property *by refusing to permit* mobile homes to be moved onto lots that were vacated based on feigned noncompliance with the Town of Aberdeen ordinances"

(emphasis added). Id.. Accordingly, Plaintiffs' sole focus in regard to any due process violations alleged in the complaint is on substantive due process, in that Plaintiffs' are attacking the actual alleged decision(s) by the Town, not an alleged failure to notify with regard to a right to challenge such decision(s). The issue of lack of notice of a right to appeal the decisions complained of is without support in the complaint, and did not arise until Petitioner filed the "Declaration of Thomas E. Tilley in Support of his Opposition to the Aberdeen Defendants' Motion to Dismiss." See Appendix B, ¶¶ 9, 10, 12 and 13.

Even if the Plaintiffs' general statement in the complaint that they were "deprived of property without due process of law" (Appendix A, Complaint, ¶ XXXIII) could be construed as including a procedural due process claim,[5] as noted above, the complaint fails to allege the facts necessary to sustain such a claim. Therefore, such claim would have to be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because when construing the allegations in a light most favorable to the Plaintiffs and assuming the facts as alleged in the complaint are true (of which there are none relevant to a procedural due process claim), no relief could be granted as a matter of law. See Conley v. Gibson, 355 U.S 41, 78 S.Ct. 99, 2 L.Ed.2d. 80 (1957).

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5 A claim of denial of one's property without due process of law, such as that pled by Petitoner, has been interpreted as a *substantive* due process claim. See Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 287-88 (4th Cir. 1998).

CONCLUSION

For the foregoing reasons, the Aberdeen Defendants respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted this the 24th day of September, 2001.

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Counsel for Aberdeen Respondents

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

THOMAS E. TILLEY;
INVESTMENT TRUST,
Plaintiff,

Case No.
1:98CV00896

vs.

TOWN OF ABERDEEN;
J ARTHUR PARKER, in his capacity as Mayor for the Town of Aberdeen, and individually; TONY ROBERTSON, in his capacity as Town Manager for the Town of Aberdeen, and individually; GILES HOPKINS, in his capacity as Planning Director for the Town of Aberdeen, and individually; DON WALKER, in his capacity as Code Enforcement Officer, and individually; THE BROUGH LAW FIRM, in its capacity as attorneys for the Town of Aberdeen; WILLIAM C. MORGAN, Jr., in his capacity as attorney for the Town of Aberdeen, and individually;
THE NORTH CAROLINA DEPARTMENT OF HEALTH SERVICES, DIVISION OF HEALTH SERVICES; COUNTY OF MOORE; STEVE BIGGS, former Town Manager of Aberdeen; BILL MARTS, former Mayor of the Town of Aberdeen; and
SAMUEL W. FIELDS, in his capacity as an agent of the N.C. Dept of Human Resources, and individually.

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES

Entered October 9, 1998

COMES NOW the afore-named Plaintiffs and for cause of action against the Defendants state as follows:

I.

Plaintiff Thomas E. Tilley is a natural individual residing in the state of North Carolina. At all times pertinent to this action Plaintiff has a title interest in Carolina Mobile Home Park in the Town of Aberdeen, County of Moore, State of North Carolina.

II.

Defendant Town of Aberdeen is now, and at all times material hereto was, a municipal corporation and governmental subdivision of the States of North Carolina.

III.

Defendant J. Arthur Parker is now, and at all times material hereto was, the Mayor for the Town of Aberdeen.

IV.

Defendant Tony Robertson is now, and at all times material hereto was, the Town Manager for the Town of Aberdeen. On information and belief, defendant is also a resident of the Town of Aberdeen, County of Moore.

V.

Defendant Giles Hopkins is now, and alt all times material hereto was, the Planning Director for the Town of Aberdeen. On information and belief, defendant is also a resident of the Town of Aberdeen, County of Moore.

VI.

Defendant Don Walker is now, and alt all times material hereto was, the Code Enforcement Officer for the Town of Aberdeen. On information and belief, defendant is also a resident of the Town of Aberdeen, County of Moore.

VII.

Defendant The Brough Law Firm is now the attorneys for the Town of Aberdeen. The mailing address of the defendant is in the City of Chapel Hill.

VIII.

Defendant William C. Morgan, Jr. is now, an attorney with Defendant The Brough Law Firm, is an attorney for the Town of Aberdeen. On information and belief defendant is a resident of the Middle District of North Carolina.

IX.

Defendant The North Carolina Department of Health Services, Division of Health Services, is now, and alt all times material hereto was, an executive agency of the States of North Carolina.

X.

Defendant Samuel W. Fields is now, and alt all times material hereto was, and agent of Defendant, The North Carolina Department of Health Services, Division of Health Services.

XI.

Defendant County of Moore is a subdivision of the state of North Carolina.

XII.

Defendant Steve Biggs was an agent of the Town of Aberdeen. On information and belief, defendant is a resident of Clayton, North Carolina.

XIII.

Defendant Bill Marts was an agent of the Town of Aberdeen. On information and belief, defendant is a resident of Pine Bluff, North Carolina.

XIV.

This action arises under the United States Constitution, particularly under the provisions of the Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States, and under federal law, particularly Title 42 of the United States Code, Sections 1983 and 1985; and under Title 42 of the United States Code, Section 1988, plaintiff is entitled to attorneys' fees to vindicate the deprivations and violations of his constitutional rights by Defendants.

XV.

This court has jurisdiction of this cause under and by virtue of Title 28 of the United States Code, Section 1331, which provides jurisdiction of matters arising under the Constitution and laws of the United States; Title 28 of the United States Code, Section 1343; and Title 28 of the United States Code, Sections 2201 and 2202, which authorize any court of the United States to declared the rights and other legal relations of any interested party seeking such declaration, and to grant further necessary or proper relief based on a declaratory judgment or decree.

XVI.

All acts alleged herein transpired within the State of North Carolina, therefore, venue is properly herein pursuant to 28 U.S.C. Section 1391(b), because the claims arose within the middle judicial district of North Carolina.

XVII.

Each and all of the acts of Defendants were done by Defendants, and each of them, as individuals and under the color and pretense of the statutes, ordinances, regulations, customs, and usages of the State of North Carolina, the Town of Aberdeen, and the County of Moore, and under the authority of their respective offices for such city and state.

XVIII.

Prior to 1986, Plaintiff owned and operated the Carolina Mobile Home Park at its present location. Plaintiff had approval to park fifty-one (51) mobile homes connected to in place septic tanks and drain fields.

XIX.

In 1986, the Defendant, Town of Aberdeen, annexed Plaintiff's property. Defendant, Town of Aberdeen, had a pre-existing ordinance stating "all developed properties in areas subsequently annexed to the town which are served by on-site septic systems may continue to use those septic systems for a period not to exceed ten years from the date that the sewer is made available to those properties as long as those properties continue to be approved by the Moore County Health Department."

XX.

In 1989, the Defendant, Town of Aberdeen, through its agent, refused to grant permits to park mobile homes at three vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $104/month in 1989.

XXI.

In 1990, the Defendant, Town of Aberdeen, through its agent, refused to grant permits to park mobile homes at three additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $114/month in 1990.

XXII.

In 1991, the Defendant, Town of Aberdeen, through its agent, refused to grant permits to park mobile homes at three additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $124/month in 1991.

XXIII

In 1992, the Defendant, Town of Aberdeen, though its agent, refused to grant permits to park mobile homes at three additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $134/month in 1992.

XXIV

In 1993, the Defendant, Town of Aberdeen, though it agent, refused to grant permits to park mobile homes at four additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $134/month in 1993 through October, and $159/month thereafter.

XXV

In 1994, the Defendant, Town of Aberdeen, though its agent, refused to grant permits to park mobile homes at four additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $159/month in 1994.

XXVI

In 1995, the Defendant, Town of Aberdeen, though its agent refused to grant permits to park mobile homes at five additional vacated lots unless those trailers hooked up to the town sewer system. Lot rent was $159/month in 1995.

XXVII

In 1996, despite continuous nonconforming use, Defendant Steve Biggs informed Plaintiff that the twenty-five vacant lots would not be permitted to park trailers because to do so would violate the "commercial highway" zoning. This was the first notice of zoning change given to plaintiffs.

XXVIII

In June 1998, Defendants Tony Robertson, Giles Hopkins and Don Walker, held a public hearing and found plaintiff in violation of the town nuisance ordinance.

XXIX

In July 1998, the Defendant, The Brough Law Firm, through Defendant, William C. Morgan, Jr., directed a letter to Plaintiff threatening legal action if Plaintiff did not contact Defendant Don Walker and comply with his demands to bring Carolina Mobile Home Park into compliance with several town ordinances.

XXX

In September 1998, the Defendant THE NORTH CAROLINA DEPARTMENT OF HEALTH SERVICES, DIVISION OF HEALTH SERVICES, through Defendant Samuel W. Fields, issued a Sewage Violation Notice to Plaintiff requiring a mobile home lot be hooked up to the sewer.

XXXI

In doing the acts and things above complained of, the Defendants were conspirators engaged in a scheme and conspiracy designed and intended to deny and deprive Plaintiff of rights guaranteed to it under the Constitution and laws of the United States, as hereinabove enumerated. Defendants, and each of them, after determining that Plaintiff could continue to use the present septic systems and park mobile homes on its property as a continuing nonconforming use determined to deprive Plaintiff of these rights in its property by refusing to permit mobile homes to be moved onto lots that were vacated based on feigned noncompliance with Town of Aberdeen ordinances.

XXXIII

By reason of conduct of defendants, and each of them, amounting to taking of Plaintiffs' PROPERTY, Plaintiff has totally been unable to earn sufficient incomes to keep the park in good repair. This anticipated result of the Defendant's conspiracy has resulting in continuing defamation of Plaintiff's reputation.

XXXIII

The conduct of defendants, and each of them, deprived Plaintiff of the following rights, privileges and immunities secured to him by the Constitution of the United States:

a. The right of Plaintiff not to be deprived of property without due process of law, secured by the Fifth and Fourteenth Amendment of the Constitution of the United States;

The right of Plaintiff not to be denied the right to equal protection of the laws, secured inversely by the Fifth Amendment and secured by the Fourteenth Amendment of the Constitution of the United States;

XXXIV

Plaintiff requests trial by jury be had on all issues at law and equity.

XXXV

The acts, conduct, and behavior of Defendants, and each of them, were performed knowingly, intentionally, and maliciously, by reason of which Plaintiff is entitled to an award of punitive damages in the sum in excess of $1,000,000.00.

WHEREFORE, plaintiff prays and demands judgment:

1. That this Court determine and declare the Plaintiff has a right to be permitted to park mobile homes on the vacant lots as a continuous nonconforming use;

2. That this Court determine and declare that Plaintiff has a right to use the current septic systems;

3. Awarding Plaintiff damages in excess of $300,000 in lost rents;

4. Awarding Plaintiff punitive damages in the amount in excess of $1,00,000.00.

5. Awarding plaintiff his costs herein and reasonable attorneys fees pursuant to 42 U.S.C. section 1998;

6. Granting Plaintiff such other and further relief as may be just.

Respectfully submitted this ___ day of October, 1998.

\s_____

Thomas E. Tilley
4920 Farrington Road
Chapel Hill, NC 27514
(919) 489-2263

\s_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
ROCKINGHAM DIVISION

NO. 1:98CV00896

THOMAS E. TILLEY, et al.,

Plaintiffs,

v.

TOWN OF ABERDEEN, et al.

Defendants.

DECLARATION OF THOMAS E. TILLEY IN SUPPORT OF HIS OPPOSITION TO THE ABERDEEN DEFENDANTS' MOTION TO DISMISS

Thomas E. Tilley declares that to his best knowledge and belief:

1. During 1989, the Town of Aberdeen (the "Town"), through its agent, refused to grant permits to park mobile homes on three vacated spaces at Carolina Mobile Homes Park (the "Park") unless the homes were hooked up to the town sewer system.

2. During 1990, the Town, through its agent, refused to grant permits to park mobile homes on three additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

3. During 1991, the Town, through its agent, refused to grant permits to park mobile homes on three additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

4. During 1992, the Town, through its agent, refused to grant permits to park mobile homes on three additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

5. During 1993, the Town, through its agent, refused to grant permits to park mobile homes on four additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

6. During 1994, the Town, through its agent, refused to grant permits to park mobile homes on four additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

7. During 1995, the town, through its agent, refused to grant permits to park mobile homes on five additional vacated spaces at the Park unless the homes were hooked up to the town sewer system.

8. The twenty-five mobile homes denied permission to be parked at the Park during 1989-1995 were replacements for mobile homes that moved out of the Park.

9. Declarant has never been given notice that the denial of a request for permit to park mobile homes at the Park could be appealed.

10. Declarant has never been given notice of how to appeal the denial of a permit to park mobile homes at the Park.

11. In 1996, defendant Steve Biggs informed Declarant that the twenty-five vacant lots would not be permitted to park trailers because to do so would violate the "commercial highway" zoning.

12. Declarant has never been given notice that the decision of defendant Biggs could be appealed.

13. Declarant has never been given notice of how to appeal Defendant Biggs' decision.

14. Prior to annexation by the Town, the Park had 51 spaces to park mobile homes,.

15. Declarant never saw, or knew of the provision of, the Aberdeen Zoning Code before obtaining it as an Exhibit to the Motion to Dismiss. Declarant based the allegation of paragraph XIX of the Complaint as to the Town's ordinance on one page of the 1975 Code that he had in my possession.

16. Declarant never saw, or knew of, the July 6, 1996 letter from Defendant Steve Biggs to Mr. Jerrell before obtaining it as an Exhibit to the Motion to Dismiss.

I declare under penalty of perjury that the foregoing is true and correct.

Executed the 25 day of May 1999.

/s/ _____
Thomas E. Tilley